

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY EVANS,

Defendant.

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Case No. 3:08cr054
and 3:10cv046

JUDGE WALTER HERBERT RICE

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE JUDGE (DOC. #49) IN THEIR
ENTIRETY; DEFENDANT'S OBJECTIONS TO SAID JUDICIAL FILING
(DOC. #50) OVERRULED; JUDGMENT TO ENTER IN FAVOR OF
PLAINTIFF AND AGAINST DEFENDANT DISMISSING DEFENDANT'S
MOTION TO VACATE JUDGMENT, ETC., PURSUANT TO U.S.C.
§ 2255 (DOC. #29), WITH PREJUDICE; CERTIFICATE OF
APPEALABILITY AND PERMISSION TO APPEAL *IN FORMA PAUPERIS*
GRANTED; TERMINATION ENTRY

Pursuant to the reasoning and citations of authority set forth by the United States Magistrate Judge, in his Report and Recommendations filed November 8, 2010 (Doc. #49), as well as upon a thorough de novo review of this Court's file and the applicable law, including a review of the transcript of said oral and evidentiary hearing (Doc. #43), said Report and Recommendations are adopted in their entirety. The Defendant's Objections to said judicial filing (Doc. #50) are overruled. Judgment will be ordered entered in favor of the Plaintiff and against


Defendant herein, dismissing the Defendant's Motion to Vacate, etc., pursuant to 28 U.S.C. § 2255 (Doc. #29), with prejudice.

A *de novo* review of the evidence presented at the hearing causes the Court (as it did the Magistrate Judge) to find that, despite being informed of his right to have an attorney file a notice of appeal on his behalf, Petitioner made no such request until long after the time in which such a document could be filed. At the conclusion of Petitioner's sentencing, this Court informed Petitioner of his right to file a notice of appeal and that counsel would be appointed for him to complete that task. Moreover, Petitioner's counsel testified that she advised her client, prior to the date of sentencing, that his sentence would exceed the recommended guideline range for the offenses to which he had entered guilty pleas. The Court did likewise, during a court appearance held after the entering of the plea and before the date of sentencing. Nevertheless, Petitioner did not request, in open court or to his counsel that a notice of appeal be filed on his behalf. Petitioner did not testify to the contrary.

Given that the Magistrate Judge's evaluation of trial counsel's conduct is one about which reasonable jurists could disagree, the Defendant is given a certificate of appealability and, further, given that any appeal of this Court's Decision would not be objectively frivolous, this Court grants leave of the Defendant to appeal *in forma pauperis*.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

September 19, 2011



WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of record